1983

Utah Department of Business Regulation, Division of Public Utilities, Committee of Consumer Services v. Public Service Commission of Utah, Brent H. Cameron, Chairman, David R. Irvine, Commissioner, James M. Byrne. Commissioner : Petition For Rehearing of Intervenor-Defendant Utah Power & Light Company

IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PUBLIC UTILITIES, Plaintiff, vs. PUBLIC SERVICE COMMISSION OF UTAH, BRENT H. CAMERON, Chairman, DAVID R. IRVINE, Commissioner, JAMES M. BYRNE, Commissioner, Defendants.	:	Case No. 19361
COMMITTEE OF CONSUMER SERVICES, Plaintiff, vs. PUBLIC SERVICE COMMISSION OF UTAH, BRENT H. CAMERON, Chairman, DAVID R. IRVINE, Commissioner, JAMES M. BYRNE, Commissioner, Defendants.	:	Case No. 19362

PETITION FOR REHEARING OF INTERVENOR-DEFENDANT UTAH POWER & LIGHT COMPANY

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STATEMENT OF THE CASE

On December 30, 1982, the Public Service Commission ("PSC") granted an application by Utah Power & Light Company ("UP&L" or the "Company"), allowing it to adjust its Energy Balancing Account ("EBA") for the period September 1981, through August, 1982 (the "Relevant Period"), by transferring $5,012,000 (representing approximately one-third of UP&L's revenues from non-tariff sales during 1981) from the EBA to its general account.[1] The PSC Order was reversed by the Utah Supreme Court on May 22, 1986.

RELIEF SOUGHT

By this Petition, UP&L seeks a rehearing of these cases and the decision of the Court: (1) affirming the Order of the PSC; or (2) remanding these cases to the PSC for additional findings of fact and conclusions of law.

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[1] In Re Application of Utah Power & Light Co., No. 82-035-14, slip op. (P.S.C. Utah Dec. 30, 1982), aff'd on rehearing, No. 82-035-14, slip op. (P.S.C. Utah July 5, 1983), rev'd, Utah Department of Business Regulation v. Public Service Commission, Nos. 19361 and 19362, slip op. (Utah May 22, 1986). The PSC Order dated December 30, 1982, and the PSC Order on Rehearing dated July 5, 1983, are collectively referred to herein as the "PSC Order". The Court's Opinion of May 22, 1986, is referred to herein as the "Opinion".

STATEMENT OF POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

UP&L claims that the Court's decision overlooks or misapprehends the following points of law or fact:

I. THE COURT HAS MISAPPREHENDED UP&L'S ARGUMENT THAT THE PSC ORDER DID NOT CONSTITUTE IMPERMISSIBLE RETROACTIVE RATEMAKING.

II. THE DECISION OF THE COURT ERRONEOUSLY FAILS TO CONSIDER THE PSC ORDER IN IN RE APPLICATION OF MOUNTAIN FUEL SUPPLY COMPANY, slip op. (P.S.C. Utah Aug. 2, 1982).

III. IF THE COURT CANNOT AFFIRM THE PSC ORDER BECAUSE OF INADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THE EBA, IT SHOULD REMAND THESE CASES FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW TO BE MADE BY THE PSC.

ARGUMENT

A petition for rehearing is proper and should be granted where the court, in its original opinion, misapprehends or overlooks points of law or fact or where the findings and conclusions of the court, board or commission below are inadequate or unclear (thereby raising, in each instance, questions as to whether a correct result was or could be reached) or where it is necessary to correct an injustice in the original opinion. See, e.g., Kirchgestner v. Denver & R.G.W.R. Co., 118 Utah 37, 225 P.2d 754 (1950); Rule 35, Utah Rules of Appellate Procedure; 5 C.J.S. Appeals & Errors § 1411.

POINT I

THE COURT HAS MISAPPREHENDED UP&L'S ARGUMENT THAT THE PSC ORDER DID NOT CONSTITUTE IMPERMISSIBLE RETROACTIVE RATEMAKING.

A. The Court's Decision Erroneously Characterizes as Prohibited "Retroactive Ratemaking" An Accounting Adjustment Designed, As the Rule Against Retroactive Ratemaking is Designed, To Encourage Efficiency.

"Before there can be retroactive ratemaking there must at least be ratemaking." Southern California Edison Co. v. Public Utility Commission, 20 Cal. 3d 813, 576 P.2d 945, 144 Cal. Reptr. 905 (1978).

In its Order on Rehearing dated July 5, 1983, the PSC stated, inter alia, that "the proposed adjustment is consistent with Commission intent that the EBA eliminate inequitable results or windfall benefits to either the Company or its ratepayers" and that the "proposed adjustment is consistent with other adjustments previously and currently made in the [Energy Balancing] Account procedure in that all are retroactive in nature and none alter the Commission approved rate." Order on Rehearing No. 82-035-14 (P.S.C. Utah July 5, 1983).

The Court's decision overlooks the rationale behind the rule against retroactive ratemaking and erroneously characterizes as prohibited "retroactive ratemaking" an accounting adjustment designed and intended to avoid the same

thing the rule itself seeks to avoid. As the court recognized the general prohibition against retroactive ratemaking is intended "to provide utilities with some incentive to operate efficiently . . . ." Opinion at 2. The PSC Order allowing the accounting adjustment in this case is consistent with this underlying policy because it encourages efficiency by protecting UP&L from being penalized for aggressively marketing excess energy production to non-tariff users in an unusual situation of abnormally high reduced demand by tariff ratepayers where its generating capacity would otherwise remain idle.

The Court misconstrued UP&L's argument that the accounting adjustment effected by the PSC Order was not retroactive ratemaking. The Court failed to note the difference between a change in the general rate charged tariff customers and the type of accounting adjustment allowed by the PSC Order. UP&L sought one-time relief from the penalty imposed by the EBA system because of its unexpectedly high non-tariff sales and did not seek an increase in the general rates charged tariff customers.

Without the modification made by the PSC's Order, the EBA system provides a disincentive to make non-tariff sales. By applying the entire amount of all non-tariff revenues (instead of only that portion of those revenues which is equal to the energy costs of producing those revenues) as a general

protect against energy costs, the EBA system produces an economic penalty to the utility which attempts to keep costly facilities in use in times of reduced demand by tariff ratepayers. By stopping or reducing production from its facilities during such times, UP&L could reduce operating costs and net revenue losses. The EBA system, as applied without the modification made in the PSC Order, penalizes the utility which keeps its facilities in operation and aggressively sells the excess capacity to non-tariff ratepayers. UP&L submits that it is anomalous, in the name of protecting against inefficiency, to strike down a procedure which protects against inefficiency.

The accounting adjustment proposed by UP&L is analogous to the accounting adjustment ordered by the California Public Utility Commission in Southern California Edison Co., 576 P.2d 945, cited in the Opinion. In each case there was an unusual one-time surfeit of funds in the energy balancing account. In each case, absent some adjustment, one group, either ratepayer or shareholder, would be unfairly penalized.[2] In Southern California Edison the Court

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[2] In Southern California Edison, the adjustment was necessitated by excess revenues in the fuel adjustment account caused by a change in tax accounting procedure that resulted in, for a time, significant profits to the company. The Supreme Court of California allowed a one-time accounting modification to pass some of the benefit on to ratepayers.

determined that such a one-time accounting modification was merely an equitable adjustment and did not constitute retroactive ratemaking.

In the Opinion, the Court noted its assumption "that the EBA order was promulgated under the Commission's ample general power to fix rates and establish accounting procedures." Opinion at 6, n. 4. The Court described the EBA as

> a rather unique device for handling not only the utilities' unstable fuel costs, but also other cost and revenue items which the PSC felt were subject to rapid and unpredictable fluctuation.

Opinion at 3. The Court further noted that

> ideally, over the long term, the account is zeroed out, i.e., the revenues flowing into the account will equal the expenditures charged to it. Thus, the EBA accomplishes the purpose of the pass-through legislation to allow expeditious rate response to those elements of cost which are subject to frequent fluctuation, and it does so without bypassing the more formal requirements of general rate making.

Opinion at 4. If the EBA is recognized as principally an accounting device of the PSC to implement general pass-through legislation, it follows that the PSC should be able to authorize changes in the accounting procedure to allow that procedure to more accurately reflect proper allocations of

energy costs. The Commission must have the continuing power and responsibility to administer and improve the EBA system. At the time the EBA was created, the PSC contemplated that accounting adjustments would need to be made periodically to correct inaccuracies in the accounting procedures. See, In Re Application of Utah Power & Light Co., Nos. 78-035-21 and 79-035-03, slip op. at 16 (P.S.C. Utah July 20, 1979). In furtherance of this continuing power and responsibility, the PSC has, in the PSC Order and in the Mountain Fuel case, supra, encouraged and directed these parties, the Division of Public Utilities and "other interested parties" to consider the solutions to the inequitable results which occur in the EBA. PSC Order, No. 82-035-14)P.S.C. Utah Dec. 30, 1982); Mountain Fuel case, supra, at 6.

Since the EBA is intended to be "zeroed out" on a periodic basis, it is essentially an account balancing mechanism designed to achieve equitable adjustments and the fair and equitable exercise by the Commission of its general powers on a continuing basis. Under the Court's decision this purpose is frustrated by a rigid and inviolate application of the rule against "retroactive ratemaking." UP&L submits that the Court's decision effectively emasculates the EBA system and precludes it from being fairly administered.

B. Even if the Court Does Deem the Modifications to the EBA Account to be Retroactive Ratemaking, UP&L Believes that the Court Should have Allowed An Exception to the General Rule Against Retroactive Ratemaking.

The prohibition against retroactive ratemaking is not absolute. "The spectre of retroactive ratemaking must not be viewed as a talismatic inhibition against the application of principles based upon equity and common sense." Roberts v. Narragansett Electric Co., #82-156-M.P., slip. op. at 5 (R.I., Jan 11, 1984). The court in its Opinion recognized the possibility of exceptions, at least implicitly, when it stated the rule that utilities "are generally not permitted to adjust their rates retroactively to compensate for unanticipated costs or unrealized revenues." Opinion at 2 (emphasis added). The key factor in determining whether to apply the rule against retroactive ratemaking should be whether application of the rule will further the public policy rationales underlying the rule, or will ultimately frustrate those rationales.

The real fear behind retroactive ratemaking is that "if a utility's income were guaranteed, the company would lose all incentive to operate in an efficient, cost-effective manner, thereby leading to higher operating costs and eventual rate increases." Narragansett Electric Co. v. Burke, 415 A.2d 177, (R.I. 1980). It is that public policy of stimulating efficiency that should guide the court in determining whether to apply the rule prohibiting retroactive ratemaking.

A great many states have recognized that utilities should be allowed retroactive rate increases to offset the effects of unusual circumstances such as freak winter storms. See, e.g., Narragansett Electric Co. v. Burke, 415 A.2d 177, (R.I. 1980) (citing cases from Connecticut, Delaware, Florida, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York and Pennsylvania.) The one-time accounting adjustment sought by UP&L is prompted by an analogous unusual circumstance. In each of these cases: the change in revenue or expenses was a result of an unforeseen and unforeseeable circumstance; the utility did its best to mitigate the negative effects of the situation and to operate as efficiently as possible; and the purpose of the accounting adjustment was to spread the risk associated with the incident fairly between the shareholders and the ratepayers.

Application of the rule against retroactive ratemaking in this case does not further any of the public policies behind the general rule. A rigid application of the general rule against retroactive ratemaking in this case situation will discourage attempts to market excess generation capacity and actually defeat the purpose of the rule. This reality is illustrated by the following statement of the court in Narragansett:

> The next time a storm of this magnitude occurs, the company would have no incentive to hire outside line and tree crews to restore service efficiently and swiftly to customers if no reimbursement for extraordinary expenses would be forthcoming. Thus, application of the rule to expenses related to such an emergency situation so inexorably related to the public health and safety would serve to thwart the goal of efficient customer service.

Narragansett Electric Co. v. Burke, 415 A.2d at 179. This Court should recognize an exception to the general rule against retroactive ratemaking in extraordinary situations such as the one presented in the present case.

The Court's holding that the rule against retroactive ratemaking precludes the adjustment to the EBA allowed by the PSC Order fails to recognize that the effect of the EBA system and the Court's ruling in this case is to retroactively reduce the rates to the ratepayers by the entire amount of UP&L's non-tariff revenues during the Relevant Period (less the amount thereof allocated to defray energy costs). Thus, it is not a question of whether or not "retroactive ratemaking" has or has not occurred but whether or not UP&L is to be penalized for its efforts to earn non-tariff revenues from which the ratepayers can be benefited. Had UP&L not utilized its facilities to make non-tariff sales there would have been no resulting benefit available to the ratepayers. Fairness requires that UP&L not be penalized for its effort to avoid this result.

POINT II

THE DECISION OF THE COURT ERRONEOUSLY FAILS TO CONSIDER THE PSC ORDER IN IN RE THE APPLICATION OF MOUNTAIN FUEL SUPPLY COMPANY, No. 81-057-19 slip op. (P.S.C. Utah Aug. 2, 1982).

In its original opinion, the Court stated:

> Neither the facts nor the opinion in Application of Mountain Fuel Supply to Adjust the Base Rate for Natural Gas Services in Utah, Case No. 81-057-19, cited by the PSC as precedent for this action, are in the record, and that case apparently was not appealed to this Court. Therefore, we are unable to determine if there were similar circumstances or if, in fact, an identical diversion of funds was allowed.

Opinion at 5, n.3.

The Mountain Fuel case should have been considered by the Court because it is essentially identical to the present case on its facts and is an important precedent and statement of the policy of the PSC in administering the EBA system. In Mountain Fuel as in this case, the PSC allowed non-tariff revenues which were credited to an energy balancing account (Mountain Fuel Supply Account No. 191), to be transferred to its general revenue accounts. As in the present case, Mountain Fuel had suffered significant losses from reductions in demand by tariff ratepayers during the early 1980s. Because of those reductions, it also made efforts to generate significant non-tariff sales revenues (i.e., revenues from various

transportation arrangements, sales for resale, and the sale of liquid hydrocarbons). It also sought to have the EBA procedures modified to allow a portion of these non-tariff revenues to be transferred to its general revenue account. In approving the stipulation between the Division and Mountain Fuel allowing this adjustment, the PSC noted that in a previous Mountain Fuel Supply matter (Case No. 80-057-10), it had specifically authorized Mountain Fuel to:

> petition this commission for exceptions to balancing account treatment for "other revenues," if in the company's opinion other treatment is warranted. Such requests will be considered on a case by case basis and will take into account financial stability of the company.

Mountain Fuel, at 5.

Fairness and consistency in administering the EBA system requires that UP&L be allowed the same kind of adjustment in its EBA with respect to the unusually high non-tariff revenues received by it during the unusual circumstances which existed during the Relevant Period as Mountain Fuel was allowed under similar circumstances during essentially the same period. The Court should consider the Mountain Fuel case as an additional reason for treating the PSC Order as something other than "retroactive ratemaking" or as an exception to the general rule against retroactive ratemaking.

The Mountain Fuel case was referred to in several places in the record on appeal and in oral argument.[3] UP&L reasonably believed that the Mountain Fuel case was properly before the Court and was not aware until the opinion was issued that the Court did not consider this case to be part of the record.[4] Whether or not it was physically included in the record, the Court can and should take judicial notice of it as it did with other court and agency decisions which were referred to in the briefs but not physically included in in the record. 2 Sutherland, Statutory Construction § 39.02 (4th Ed. 1973). As a convenience to the Court, UP&L has attached a copy of the Mountain Fuel case to this Petition as Appendix A.

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[3] Brief of Intervenor Utah Power & Light Co. at 4, Utah Department of Business Regulation v. Public Services Commission, Nos. 19361 & 19362, slip op. (Utah 1986); In Re Application of Utah Power & Light Co., No. 82-035-14, slip op. at 3 (P.S.C. Utah December 30, 1982) (mentioning the Mountain Fuel case in its findings of fact); In Re Application of Utah Power & Light Co., No. 82-035-14, slip op. at 4 (P.S.C. Utah December 30, 1982) (mentioning the Mountain Fuel case in its conclusions).

[4] UP&L has been unable to obtain a copy of the index of the record on appeal before the Court. The clerk has advised it that the Court cannot locate its copy, nor does the Public Service Commission, the Attorney General's office, or the Department of Business Regulation, Division of Public Utilities have a copy.

POINT III

IF THE COURT CANNOT AFFIRM THE PSC ORDER BECAUSE OF INADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING THE EBA, IT SHOULD REMAND THESE CASES FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW TO BE MADE BY THE PSC.

UP&L urges the Court in this Petition to affirm the PSC Order and preserve the equitable balancing effect and application of the EBA system. Alternatively, in the event the Court feels that the PSC Order does not contain sufficient findings and conclusions about the EBA for the Court to entirely affirm the PSC Order, UP&L urges the Court to remand these cases to the PSC with direction to make such findings and conclusions.

> The threshold question in an administrative appeal is whether the record is adequate to permit meaningful judicial review. If it is not, and the basis of an administrative decision is unclear, it may be necessary to remand the case for preparation of a record revealing the agency's reasoning process. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the agency's action is supported by substantial evidence.

White v. Alaska Commercial Fisheries Entry Commission, 678 P.2d 1319, 1322 (Alaska 1984) (citations omitted). The court may raise the question of the adequacy of findings of fact and conclusions of law by the administrative agency on its own

recognizance even if the issue is not properly raised by the parties on appeal. Id. at 1322.

The issues raised in this case are of great importance to the PSC, the utilities and the ratepayers. It is critical that the PSC be given a chance to fully explain its reasoning before the Supreme Court makes a final decision on the matter. The ratepayers, and the utilities, are entitled to an appellate decision based on an adequate and comprehensive set of findings of fact and conclusions of law by the PSC.

CONCLUSION

For the foregoing reasons, UP&L respectfully requests that this Petition for Rehearing be granted.

DATED this 19th day of June, 1986.

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CERTIFICATE

The undersigned counsel for Petitioner-Intervenor, Utah Power & Light Company, hereby certifies that the foregoing Petition for Rehearing is brought in good faith and not for delay.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
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CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Petition for Rehearing of Intervenor-Defendant Utah Power & Light Company were served by hand delivery on this 19th day of June, 1986, upon each of the following:

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